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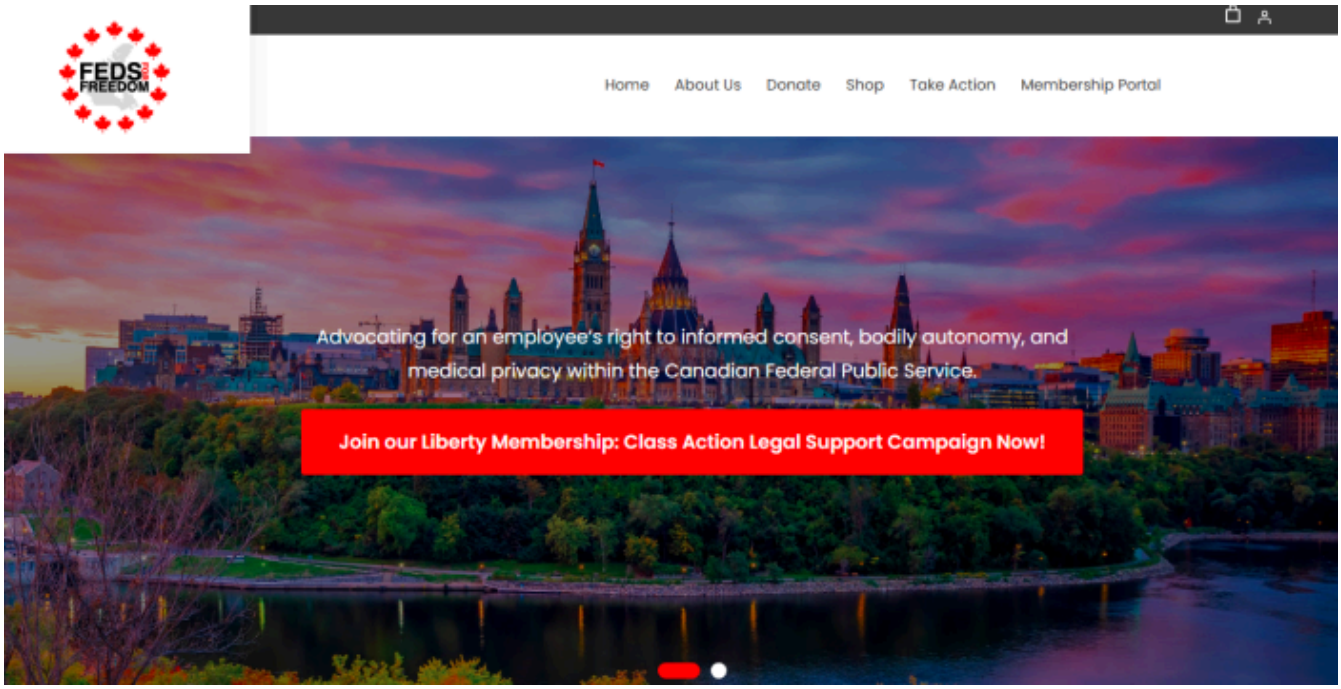
MAY 15, 2025 BY RONNIE

The Payne Appeal: What This s.2(d) Challenge Will Look Like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The Federal Government is appealing a shocking ruling from January which allowed a Proposed Class Action to proceed. Despite expectations to the contrary, Justice Richard Southcott (mostly) dismissed a Motion to Strike.

The challenge was organized by the group, Feds For Freedom. It's comprised of 3 Representative Plaintiffs, all from different areas of the public sector.

- Department of National Defence (Stacey Helena Payne)
- Correctional Services Canada (John Harvey)

- Federal Economic Development Agency for Southern Ontario (Lucas Diaz Molaro)

They had their employment threatened in late 2021 with the introduction of the vaccine passport. Unlike earlier challenges, this one survived, due to the innovative arguments raised.

This lawsuit challenged not the mandates themselves, but the manner in which they were implemented. The case argued that there effectively were no grievance options because of this.

It's not being hyperbolic to say this will impact employment rights at the Federal level. Either freedom of association is a valid ground to challenge such mandates, or there may not be any option at all.

What Happened With Justice Southcott's Decision

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Payne v. Canada, 2025 FC 5 (CanLII)

Document | History (0) | Cited documents (28) | Treatment (0) | CanLII Connects (0)

Date: 2025-01-02
File number: T-2142-23
Citation: Payne v. Canada, 2025 FC 5 (CanLII), <https://canlii.ca/t/k8jck>, retrieved on 2025-01-07

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Date: 20250102
Docket: T-2142-23

Citation: 2025 FC 5

> Right of employee
> 208 (1) ***Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved***
> .
> (a) by the interpretation or application, in respect of the employee, of
> (i) a ***provision of a statute or regulation, or of a direction or other instrument made or issued by the employer, that deals with terms and conditions of employment***, or

(ii) a provision of a collective agreement or an arbitral award; or
(b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.

No Right of Action
Marginal note: Disputes relating to employment
.
236 (1) The right of an employee to seek redress by way of grievance for any dispute relating to his or her terms or conditions of employment is ***in lieu of any right of action that the employee may have*** in relation to any act or omission giving rise to the dispute.

The initial Motion to Strike was based on s.208 and s.236 of the FPSLRA, or the Public Sector Labour Relations Act. In short, employees have the right to grieve, but not to sue. This is similar to how unionized workplaces function in general.

The Statement of Claim revolved around 2 torts:

1. Section 2(d) of the Charter, freedom of association, and
2. Malfeasance of Public Office

First, the s.2(d) argument was that the injection pass was implemented in a heavy handed manner, without due process or meaningful consultation. As such, it circumvented any legitimate grievance process. The result is that it deprived workers of their right to freedom of association, within the context of voluntary employment.

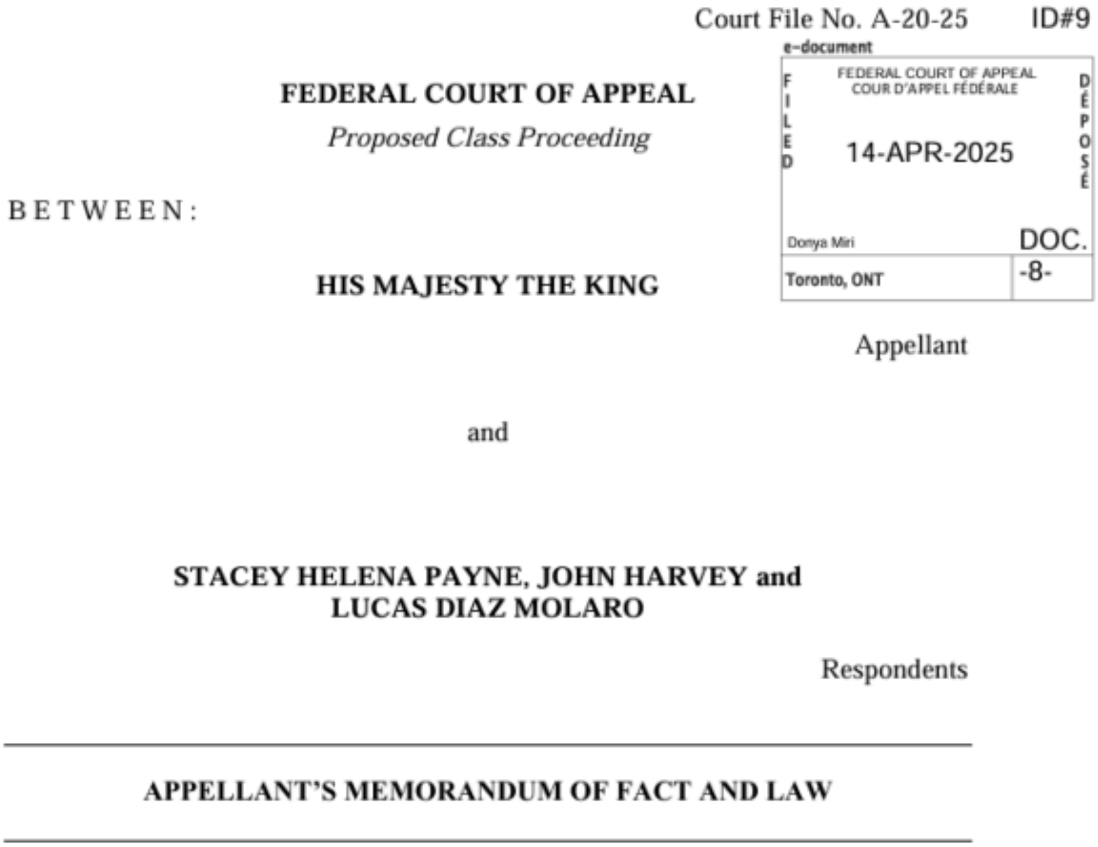
Second, the way in which this was implemented amounted to an abuse of process and malfeasance of office by the politicians involved.

Justice Southcott accepted the first argument, that this was potentially a s.2(d) breach. However, he ruled that malfeasance was an issue that *could* be grieved. There was one caveat though: because there would likely be more Plaintiffs in this Class Action, it's possible that one could be found who *didn't* have that grievance right, such as a summer student.

The s.2(d) tort was allowed to proceed, while the malfeasance was struck, with Leave to Amend.

The implications are far reaching. If the s.2(d) argument was left standing, there would be precedent to prevent any such future infringements on employee rights. Unsurprisingly, the Crown appealed.

Ottawa Claims Southcott Should Have Refused Jurisdiction



Court File No. A-20-25 ID#9

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FEDERAL COURT OF APPEAL

Proposed Class Proceeding

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

STACEY HELENA PAYNE, JOHN HARVEY and LUCAS DIAZ MOLARO

Respondents

APPELLANT'S MEMORANDUM OF FACT AND LAW

28. The ***motion judge erred by taking jurisdiction over any aspect of the plaintiffs' claim***. First, he erred in law by failing to apply the correct legal test. Instead of assessing whether the dispute related to a matter that could be grieved under the FPSLRA, he relied on the fact that a similar issue could not be grieved under the labour relations regime that was at issue in Morin. Had the motion judge rendered his decision based on the language of s. 208, ***he would have found it plain and obvious that the matter could be grieved regardless of whether it was characterized as a dispute over the terms and conditions of employment or a dispute over the process by which terms and conditions were changed***.

29. Second, and in any event, the motion judge committed palpable and overriding errors in accepting that the essential nature of the plaintiffs' s. 2(d) claim related only to process. He wrongly assumed that the essential character of the dispute would be different for each of the two causes of action pled. ***This approach was contrary to consistent appellate authority holding that a court's characterization of the essential nature of a dispute must be based on the facts giving rise to the dispute***, and not by the legal characterization of the wrong. ***Since none of the material facts pled related to the process by which the Vaccination Policy was adopted***, it was a palpable and overriding error to conclude that that was the essential character of the dispute.

In their filings, the Government lawyers argue that the nature of the case involves changes to the terms and conditions of employment. Section 208 FPSLRA gives everyone grievance rights, so logically, implementing the vaccine mandates should be covered.

Respondents Say Justice Southcott Made No Errors

39. Southcott J. did not err by allowing the plaintiffs' Charter claim to survive the motion to strike.
Next, Southcott J. did not commit palpable and overriding error in his consideration of the plaintiffs' Charter claim. Indeed, ***he did not engage in any such analysis because the sufficiency of the plaintiffs' s. 2(d) claim was not even challenged by the appellant***. The appellant's motion materials include several references to the insufficiency of the plaintiffs' misfeasance claim, ***but includes no such reference to the plaintiffs' s. 2(d) claim***

40. There is a ***"stringent" test for allowing new arguments on appeal***: a new issue should only be considered "where [the Court] is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice." The appellant has failed to identify any "exceptional circumstances" permitting it to challenge this cause of action for the first time on appeal. ***Nor has it explained how Southcott J. committed palpable and overriding error by not considering an argument that the appellant itself did not raise***.

> 41. Further, ***any such arguments would have failed as the plaintiffs' have pled an arguable Charter claim***. The appellant here takes an unduly narrow view of the Claim contrary to the holistic and generous approach required in interpreting pleadings on a motion to strike.

> 47. As written by Southcott J., the plaintiffs alleged "that the Treasury Board ***acted with reckless indifference or willful blindness*** in issuing the Policy in that… it had no basis in fact to justify the Policy as a measure to prevent transmission of the virus." Specifically, the Claim states that the Treasury Board mandated vaccination for the stated purpose of preventing transmission of COVID-19 ***but, in so doing, ignored the potential inefficacy of the vaccines, the potentially serious adverse effects, and the significant detriment that could have been suffered by the plaintiffs, among others. The incongruity between the Treasury Board's knowledge and its stated intention is demonstrative of bad faith and/or dishonesty***. Similar pleadings have been found to meet the standard of reasonable pleadings on a motion to strike.

> 50. Lastly, the appellant argues that leave to amend should not have been and cannot be granted in this case. Once again, the appellant reiterates its argument at the motion stage: the Claim ought to have been grieved. Southcott J. considered and rejected this argument. ***He found that it was plausible that the Federal Court had jurisdiction, at least over the Charter allegations, such that the Claim could survive this preliminary motion***.

The Respondents take the position that Justice Southcott made no major errors with the ruling, and that the case ought to proceed.

Interestingly, the Appellants (Government) are now questioning whether or not the s.2(d) was pleaded with sufficient detail, an argument they *didn't* raise at the initial hearing.

Keep in mind, this was just a Motion to Strike. It's a look at the pleadings themselves. This isn't meant to be a deep dive into the facts or the evidence.

Brief Timeline Of Major Events In Case

October 6th, 2023: Statement of Claim is filed on behalf of 3 Representative Plaintiffs.

November 9th, 2023: Government responds with their Notice of Intent.

May 31st, 2024: Government sends notice that it intends to bring Motion to have the case struck (thrown out) in its entirety.

June 6th, 2024: Prothonotary Ring gives directions that there be case management.

June 10th, 2024: Chief Justice Crampton directs (a) Justice Southcott and (b) Prothonotary Ring to be assigned manage the proceeding.

July 1st, 2024: Prothonotary Ring issues schedule for documents to be served for Motion to Strike.

August 19th, 2024: Government brings its Motion to Strike.

October 1st, 2024: Plaintiffs file responding arguments as to why case shouldn't be struck.

December 13th, 2024: Motion to Strike is argued before Justice Southcott.

January 1st, 2025: Justice Southcott *partially* grants the Motion to Strike. The tort of Malfeasance of Public Office is struck, but with Leave if eligible Plaintiffs are identified. The Section 2(d) claims are allowed to proceed.

January 13th, 2025: Notice of Appeal is filed.

January 21st, 2025: Notice of Appearance is filed.

February 12th, 2025: Parties file their agreement as to what the contents of the Appeal Book will be. This is a requirement unique to the Federal Court of Appeal.

March 14th, 2025: The Appeal Book is filed.

April 14th, 2025: Appellants file their written arguments.

May 14th, 2025: Respondents file their written arguments.

Payne Part Of Series Of s.2(d) Challenges In Canada

CASE NAMES	PAYNE/BCPSEF	HILL/UHCWBC/UHCWO
Government Workers?	Yes	No
Filed Federally?	Payne	Hill
Filed in B.C.?	BCPSEF	UHCWBC
Filed in Ontario.?	n/a	UHCWO
Wrongful Termination by Gov't?	Yes	No
Inducement to Breach Contract?	No	Yes
Breach s.2(d) Charter Rights?	Yes	Yes
Malfeasance of Public Office?	Yes	Yes

See parts 1, 2, 3, 4, 5 and 6 in this series.

All 5 of these cases (from Ontario, B.C. and the Federal Courts) involve the Section 2(d) tort in some way. How it applies differs somewhat between them.

Payne involves employees of the Federal Government, whereas Hill involves employees of *Federally regulated industries*, specifically, the airlines. While unionized, WestJet and Air Canada aren't part of the Government. The airlines don't use the FPSLRA, and the Government lacks standing to invoke the collective bargaining agreement of *other people*.

These subtle, but important differences explain why Payne was appealed, but Hill wasn't.

There's a similar distinction between the B.C. Government employees case and the health care workers one. Likewise in Ontario, Plaintiffs aren't directly employed by Government there either.

We'll have to see how Payne plays out, but this case could easily end up before the Supreme Court. It's not an exaggeration to say that there will be long lasting implications on employment rights, at least at the Federal level.

PAYNE APPEAL DOCUMENTS:

(1) Payne Notice Of Appeal January 2025

(2) Payne Notice Of Appearance January 2025

(3) Payne Agreement To Contents Of Appeal Book February 2025

(4) Payne Joint Appeal Book March 2025

(5) Payne Appellants Memorandum Of Fact And Law April 2025

(6) Payne Respondents Memorandum Of Fact And Law May 2025

PAYNE FEDERAL COURT DOCUMENTS:

(1) Payne Statement Of Claim October 2023

(2) Payne Notice Of Intent To Defend November 2023

(3) Payne Letter Intent To Strike May 2024

(4) Payne Defendant Motion Record To Strike August 2024

(5) Payne Plaintiff Responding Motion Record October 2024

(6) Payne Transcript Of Southcott Hearing December 2024

(7) https://www.canlii.org/en/ca/fct/doc/2025/2025fc5/2025fc5.pdf

(8) https://www.canlii.org/en/ca/fct/doc/2025/2025fc5/2025fc5.html

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